(16)

No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Rule 29.1 Listing

Albertsons has no parent companies or nonwholly owned subsidiaries to list.

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SUMMARY OF REPLY ARGUMENT

Kirkingburg has no disability under the ADA. His major life activity of seeing is not significantly restricted, i.e., his overall vision functions almost as well as that of a binocular individual, and he was not regarded as being disabled by Albertsons. However, even if this Court holds that Kirkingburg is disabled, the Court also must find that Kirkingburg was qualified for the truck driver position in order for his ADA claim to proceed.

Kirkingburg is not a qualified individual under the ADA. He cannot perform an essential function (driving a truck in interstate commerce) of the employment position he held (truck driver for Albertsons).

Albertsons' qualification standard screened Kirkingburg out of his position. The standard dictated that any individual with less than 20/40 vision in each eye (corrected) could not drive a truck in interstate commerce. This standard is job-related and consistent with business necessity. It mirrors the same safety standard established by the DOT in 1970, which remains unchanged to this day.

Moreover, Kirkingburg posed a direct safety threat by driving a truck in interstate commerce. Albertsons is justified in following the minimum safety requirements established by the DOT (which also state that anyone with 20/40 vision in each eye should not drive a truck).

There is no reasonable accommodation which would allow Kirkingburg to attain 20/40 vision in his left eye and meet Albertsons' minimum safety standards. By obtaining an experimental vision waiver from the DOT, Kirkingburg did not come into compliance with Albertsons' qualification standards. He simply opted in to an experimental program designed to determine whether the DOT should lower the vision standards for truck drivers. It has not.

ARGUMENT

I. Kirkingburg Is Not Disabled

The ADA defines a disability as a physical impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(2)(A). In this case, whether Kirkingburg's monocular vision is a physical impairment is not at issue. What is at issue is whether that physical impairment "substantially limits" Kirkingburg's major life activity of seeing.

There are some physical impairments that, by their very nature, are inherently substantially limiting. They include HIV, total blindness, total deafness, and paraplegia.[1] These and similar impairments are inherently substantially limiting because of the resulting functional impairments these conditions are characterized by and obviously cause.[2] As the EEOC recognizes, monocularity is not one of those

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[1] See 29 C.F.R. Pt. 1630 App. § 1630.2(j) (Interpretive Guidance) (discussing HIV infection as inherently substantially limiting). See also EEOC Compliance Manual § 902.4(c)(1), p. 902-21 (discussing the fact that in very rare circumstances, impairments are so severe that they substantially limit major life activities).

[2] This Court declined to find that asymptomatic HIV will always be a disability, but instead ruled that one specific woman was disabled because her ability to reproduce was substantially limited. *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 2207 (1998). In fact, if an individual is prepubescent, post-menopausal, or celibate (e.g., for religious reasons), query whether that individual would qualify for protection under the ADA on the ground that he or she is substantially limited in the major life activity of reproduction.

impairments.[3]

It is also well established, as expressed by this Court in *Bragdon v. Abbott*, that "substantially limited" does not mean utter inability. *Bragdon* at 2206 (". . . the definition is met even if the difficulties are not insurmountable").

The overwhelming majority of impairments fall somewhere in between the extremes of complete ability and utter inability. For these impairments, it is necessary to analyze an individual's functions to measure the effect of the impairment on his or her life activities.[4] The operation of the "substantially limited" prong necessitates investigation beyond a description, or naming, of the physical impairment and compels a functional analysis.

A. A functional analysis is necessary.

In order to determine whether Kirkingburg's major life activity of seeing[5] is "substantially limited," it is

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[3] In its *Amicus Curiae* Brief, the EEOC states "[i]n any event, monocular vision is *frequently* a disability under the ADA, because it substantially limits both the amount (visual field) and the quality (ability to see in three dimensions) of an individual's major life activity of seeing" (EEOC Br., 7) (emphasis added); "[b]oth the amount that a monocular person sees and the quality of what such a person sees *may be* substantially less than that of an individual with binocular vision" (EEOC Br., 13) (emphasis added).

[4] In fact, von Noorden (cited by Kirkingburg as an authority in the area of ophthalmology) essentially says that every person sees differently from every other person. Gunter K. von Noorden, *Binocular Vision and Ocular Motility, Theory and Management of Strabismus* at 29 (5th ed. 1996).

[5] Kirkingburg makes no effort to establish, and apparently concedes, that he is not substantially limited in the major life activity of

necessary to examine the expected permanent or long term impact of Kirkingburg's vision impairment, in addition to the effects of the nature and duration of the impairment on Kirkingburg's life, to determine whether he is substantially limited in the major life activity of seeing. 29 C.F.R. § 1630.2(j)(2).

Kirkingburg asserts that he is substantially limited in the major life activity of seeing because he is (1) absolutely unable to perform stereopsis; (2) has suffered significant loss of acuity in one eye; and (3) has experienced an overall narrowing of his peripheral vision (Resp. Br., 11). Kirkingburg also asserts that he is significantly restricted as to the condition and manner in which he sees compared to the average person in the general population, because he must use one eye to do what most people use two eyes to do (Resp. Br., 21-22). In doing so, Kirkingburg simply describes monocularity; he names the condition he has.

Kirkingburg asserts that he is not required to establish that his limitation in sight substantially limits his ability to perform "some indeterminate number of his or some average individual's routine daily activities" (Resp. Br., 11). The EEOC *Amicus Curiae* Brief essentially agrees with Kirkingburg, that whether his monocular vision may not also limit other "normal daily activities" is of "no significance" (EEOC Br., 7).

This view is contrary to the EEOC's views as expressed in the EEOC Regulations[6] as well as in the EEOC

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working (Resp. Br., 19-20).

[6] Determining whether an individual has a disability is "not necessarily based on the name or diagnosis of the impairment the person has, but rather the effect of that impairment on the life of the individual." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretive Guidance).

Technical Assistance Manual, Compliance Manual and Enforcement Guidance. A survey of interpretive sources published by the EEOC supports conducting a functional analysis to determine whether Kirkingburg's impairment is substantially limiting.

The EEOC describes the required functional analysis as follows: "The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition." EEOC Enforcement Guidance on the Employment Provisions (Title I) of the Americans with Disabilities Act in Psychiatric Disabilities, § 915.002, p. 6 (March 25, 1997). Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work and in other settings, as well as evidence showing that the individual's functional limitations are linked to his or her impairment. Id.

EEOC investigators are also instructed that it is insufficient for an individual merely to state that the condition interferes with the ability to conduct a major life activity. EEOC Compliance Manual, § 915.002, at p. 902-22 (reissued Mar. 14, 1995). The individual should explain the extent of the interference, and should provide information regarding whether the condition prevents the individual from performing a major life activity at all, whether he or she can perform the major life activity under certain conditions, and whether the individual can perform the major life activity for short or long periods of time. Id.

The EEOC's Technical Assistance Manual provides "[the nature, duration and long term impact of the impairment] must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the

effect of an impairment or condition on the life of a particular person. * * * The determination as to whether an individual is substantially limited must always be based on the effect of an impairment on that individual's life activities." EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 2.1(a)(iii), p. II-4 (Jan. 1992) (emphasis in original).

In another source, the EEOC describes the functional test as follows: "In most cases a careful, case-by-case analysis is necessary to determine whether an impairment substantially limits any of a person's major life activities. This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual." EEOC Compliance Manual, § 915.002, at p. 902-18 (reissued Mar. 14, 1995). The EEOC also describes medical documentation as "a good starting point" for determining the extent to which a physical or mental impairment limits an individual's major life activities. Id. at p. 902-21. In this case, both Kirkingburg and the EEOC urge the Court to end its analysis there (Resp. Br., 11; EEOC Br., 7).[7]

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[7] Not surprisingly, many courts have embraced a functional analysis in determining whether an individual is substantially limited in performing a major life activity, even when the major life activity is an intrinsically physical one. See *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829, 834 (1998) (firefighter's 20/400 vision substantially limited him in major life activity because the impairment completely prevented him from driving, reading, distinguishing people's faces, etc.); *Wilson v. Pennsylvania State Police Department*, 964 F. Supp. 898, 907-909 (E.D. Pa 1997) (genuine issue of material fact exists as to whether a state trooper applicant was substantially limited in the major life activity of seeing due to effects on driving, cooking, reading, and caring for infant son); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1430 (N.D. Iowa 1996) (firefighter applicant who cannot drive, read, watch television or

In order to determine whether Kirkingburg's physical impairment substantially limits the major life activity of seeing, it is necessary to examine how his seeing significantly restricts him. Albertsons set forth a functional analysis of whether Kirkingburg is substantially limited in the major life activity of seeing in its Brief on the Merits, and relies on that analysis (Pet. Br., 21-25). Kirkingburg failed to provide persuasive evidence that his seeing is significantly restricted by his vision impairment; thus, he is unable to establish that he is disabled within the definition of the ADA.[8]

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movies, walk in unfamiliar settings or read street signs was held to be substantially limited in the major life activity of seeing).

[8] The EEOC asserts that the summary judgment record regarding whether Kirkingburg was disabled was not well developed because the Company did not move for summary judgment on that ground (EEOC Br., 8, 10, 11). However, Kirkingburg has not suggested he needs an opportunity to present additional evidence on the issue of disability. Also, the Ninth Circuit did not remand the issue whether Kirkingburg was disabled for further fact finding, but instead ruled on this issue.

It is appropriate for this Court to address the issue of disability. In *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379-380 (1995), this Court reached the merits of a claim that was raised for the first time in the Petitioner's Brief on the Merits. This Court stated "[o]ur traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* at 379 (internal citations omitted). This Court continued by stating that ". . . even if this were a claim not raised by the petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice permits review of an issue not pressed so long as it has been passed upon." *Id.* (internal citations omitted).

The case cited by Kirkingburg to support this argument is not applicable to the situation at hand. In *Blessing v. Freestone*, 529 U.S. 329, 340, 117 S.Ct. 1353, 1359 n. 3 (1997), only those questions ". . . which were neither raised nor decided below. . ." were not reviewed

B. Albertsons did not regard Kirkingburg as disabled.

Both Kirkingburg and the EEOC assert that the issue whether Kirkingburg was "regarded as" disabled should not be decided by this Court because the question was not raised in Albertsons' Petition for Writ of Certiorari. It is true that Albertsons did not include the specific question whether Kirkingburg was "regarded as" disabled in its questions presented. However, this specific question was raised and decided by the Ninth Circuit Court of Appeals. In *Lebron*, this Court noted that it will reach questions ". . . fairly embraced within the questions set forth in the petition for certiorari. . . ." *Lebron* at 379-380.

The ADA provides three alternative criteria for determining whether an individual is disabled. Two are at issue here: whether Kirkingburg has a physical impairment that substantially limits one or more of his major life activities and whether he is "regarded as" having such an impairment.[9] A finding that Kirkingburg is disabled under

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by this Court. In the instant case, the Ninth Circuit Court of Appeals did raise and decide this issue. Thus, even though Albertsons did not ask the District Court for summary judgment on the issue of disability, this Court may address it because the Ninth Circuit passed judgment on the issue.

[9] Kirkingburg and the EEOC argue that this Court should not reach the "regarded as" issue because Albertsons asked in its Petition for Certiorari whether Kirkingburg is disabled *per se* (Resp. Br., 29; EEOC Br., 7). This is exactly what the supervisor's "legally blind or blind in one eye" comment indicates: all the supervisor did was name or describe the condition Kirkingburg has (J.A., 341). He is a monocular individual, i.e., blind in one eye.

The suggestion (Resp. Br., 29-30; EEOC Br., 20) that the supervisor's comment could fairly mean that he thought Kirkingburg, who had driven a truck for Albertsons in the past, was totally blind is not

either of the two theories would lead to the analysis of whether he is qualified in order to determine whether he is entitled to ADA protection. In other words, whether Kirkingburg is "regarded as" disabled could be determinative of whether he is entitled to the protection of the ADA. Thus, the "regarded as" issue is "fairly embraced" within the question whether Kirkingburg (as a monocular driver) is *per se* disabled under the ADA. Albertsons relies on the discussion in its Brief on the Merits on the issue whether the Company regarded Kirkingburg as disabled (Pet. Br., 25-28).

There is sufficient evidence for the Court to find that Albertsons did not regard Kirkingburg as disabled. However, if this Court disagrees and determines Kirkingburg was "regarded as" being disabled, such a finding will not necessarily require a remand to the lower court as suggested by Kirkingburg (Resp. Br., p. 12). If this Court finds that Kirkingburg is not qualified under the ADA for the truck driving position, the "regarded as" issue will become moot because Kirkingburg's cause of action will be dismissed.

II. <u>Kirkingburg Is Not Qualified for the Position</u>

A. Albertsons' qualification standard is job-related and consistent with business necessity.

Albertsons requires all of its interstate truck drivers to meet minimum DOT vision safety regulations. Pursuant to those requirements, which have not changed since 1970, drivers' minimum visual acuity standards are 20/40 in each eye. 49 C.F.R. § 391.41(b)(10). In the instant case, there is

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reasonably embraced by either the comment or the situation.

no factual dispute that Kirkingburg's visual acuity is 20/200 uncorrectable vision in his left eye.

B. Objective evidence supports a finding that Kirkingburg poses a direct safety threat.

The ADA expressly states that employers, when setting qualification standards, may impose a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in work place. 42 U.S.C. § 12113(b).

Kirkingburg asserts that individualized assessment is required if a blanket qualification standard disqualifies individuals due to a disability based on "safety fears" (Resp. Br., p. 39). Kirkingburg further asserts that Albertsons justifies its rejection of Kirkingburg's experimental waiver on "generalized fears" about safety (Resp. Br., 14).

Assuming, *arguendo,* that Albertsons had an obligation to conduct an individual assessment, evidence that may be relevant to direct threat determination includes opinions of those who have expertise in the disability involved and/or direct knowledge of the individual with the disability. See 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance).[10] In assessing the objective evidence available regarding a dentist's actions in denying treatment to an individual with HIV, this Court stated that the views of public health authorities carry "special weight and authority."

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[10] The EEOC has expressed support for looking to objective experts in specific fields. See, for example, 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance): "Relevant evidence may include . . . opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."

Bragdon, 118 S.Ct. at 2211.

Here, the DOT, a public safety authority, has expertise in maintaining safety on the road by setting certain minimum physical standards, including vision standards. Implicit in the DOT's established minimum physical requirements is that the drivers who do not meet the minimum requirements of the statute are not safe. Relying on an extensive and comprehensive federal regulatory scheme intended to preserve highway safety cannot reasonably be characterized as having "generalized fears."

In this case, the EEOC acknowledges in its *Amicus Curiae* Brief that the direct threat defense "may be made out when a firm takes action required by a federal safety standard" (EEOC Br., 8). However, the EEOC asserts that Albertsons would still have been in compliance with all applicable regulations by permitting Kirkingburg to apply for a vision waiver (Id.). Kirkingburg agrees (Resp. Br., 14-15).

The issue here, however, is a decision by Albertsons to follow the long-held and established regular vision standards and not to accept the waiver. Albertsons is justified in relying on the DOT minimum vision standards. Albertsons is equally justified in not adopting the waiver.[11] The waiver is part of an experimental program that was set up in an attempt to determine whether the minimum vision standards should be changed in the future. They were not.

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[11] The Ninth Circuit stated that the record is silent as to whether Albertsons knew at the time it rejected Kirkingburg's waiver that the experimental waiver program was invalid (J.A. 243). However, a citizen is presumed to know the law (*Atkins v. Parker*, 472 U.S. 115, 130 (1985)); and therefore, does not need to establish that in the record. At the time that Albertsons rejected Kirkingburg's waiver, the protocol for the waiver program was clearly experimental in nature and had not been appropriately validated then or since.

The issue is not whether Albertsons could have been in compliance if it took a waiver it chose not to take, but rather whether the Company can make out the case that its decision is supported by the direct threat defense. It can.

The experimental waiver program never resulted in changes to the minimum vision standards expressed in 49 C.F.R. § 391.41(b)(10) and has never been adopted as law.[12] The waiver program was and is an experimental program implemented to gather empirical data on the safety of drivers who did not meet the minimum DOT vision standards, to determine whether the minimum vision standards could be lowered without compromising highway safety.[13]

C. The experimental vision waiver program and its study was fatally flawed.

Objective evidence demonstrates that the experimental vision waiver program was not consistent with the public safety goals of the DOT regulations; in fact, the study of the FHWA's experimental vision waiver program was fatally flawed and cannot be construed as demonstrating that visually impaired drivers can safely operate commercial motor vehicles in interstate transportation.

In 1992, the FHWA announced its intention to issue waivers of the DOT vision standards to "conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the

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[12] The DOT has not changed the Regulations, themselves, to include a lower vision requirement. 63 Fed. Reg. 41769, 41770 (1998) (to be codified at 49 C.F.R. Pt. 391) (proposed Aug. 5, 1998).

[13] Kirkingburg characterizes the experimental waiver program identically. (Resp. Br., 39).

Federal vision requirements." Qualification of Drivers, 57 Fed. Reg. 23370, 23370 (1992).[14] The FHWA stated it believed existing studies were not sufficient to identify safe levels for the vision requirements of drivers and expressed its intention to use the data generated by the waiver study to explore the feasibility of relaxing the vision standards in 49 C.F.R. § 391.41(b)(10). Qualification of Drivers, 57 Fed. Reg. 10295, 10295 (1992); Qualification of Drivers, 57 Fed. Reg. 31458, 31459 (1992).[15]

The protocol for the study was criticized by agencies that filed comments both for and against the program. The National Private Truck Council, while expressing strong support for the waiver program, was gravely concerned about the study group proposed by the FHWA and the lack of a compatible control group. Id. at 31459. The Insurance Institute for Highway Safety ("IIHS") opposed the program because evidence that visually impaired commercial drivers have an increased risk of crash involvement indicated it would place the public at unacceptable risk. They reported a study that found heavy vehicle operators with less than 20/40 visual acuity in one eye had 65% more crashes while operating commercial vehicles than operators with at least 20/40 acuity in each eye.[16] Id. at 31459, FHWA Docket No.

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[14] The FHWA rejected the strong recommendations of its own consultants to *strengthen* the standard. Lawrence E. Decina, et al., *Visual Disorders and Commercial Drivers* at 37-40 (1991).

[15] Apparently, the study did not attempt to differentiate between the level of visual impairment of the drivers in the study group, in spite of the fact that the FHWA's objective was to determine the level of vision impairment that could be accommodated without increasing safety risk.

[16] This was after adjustment for age using ANCOVA (analysis of covariance). Patrice N. Rogers, et al., *Accident and Conviction Rates*

MC-92-27. IIHS also provided an extensive list of methodological flaws in the protocol. In spite of the seriousness of the criticisms, the FHWA went forward with the program and contracted with Conwal, Incorporated to administer the program. Qualifications of Drivers, 59 Fed. Reg. 50887, 50890 (1994).

On August 2, 1994, the D.C. Circuit invalidated the vision waiver program because it did not meet the requirements of 49 U.S.C. § 2505(f) (the Motor Carrier Safety Act of 1984 only allows a waiver of regulations establishing minimum federal safety standards if "such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles"). *Advocates for Highway Safety v. Federal Highway Administration*, 29 F.3d 1288, 1290 (CADC 1994).[17] Shortly thereafter, the FHWA announced a temporary revalidation of the current waivers to allow drivers previously issued waivers to continue participating in the program until its conclusion. Id. at 50887. It claimed the data from the first two years of the study provided empirical evidence that drivers who did not meet the DOT vision standards could drive safely. Id at 50890.

The study and its results were disturbingly flawed. When the researchers encountered difficulties recruiting volunteers for the control group, they chose not to use one.[18] For the study's findings to be valid, they had to use a control group, comparable to the visually impaired drivers with

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of Visually Impaired Heavy-Vehicle Operators at 23-24 (1987).

[17] See also *Advocates* at 1294.

[18] John R. Sheridan & Ann F. DuLaney, *Qualifications of Drivers - Vision, Diabetes, Hearing and Epilepsy* at 6 (1997).

respect to the variety of driver characteristics and operational environments known to affect crash risks, to eliminate the effects of such confounding variables.[19]

Instead, the entire analysis of the safety of visually impaired drivers was limited to comparing their accidents to *estimates* of accidents for the entire population of heavy truck operators in the United States.[20] To compound the validity problems this created, the data for the two groups were from different time periods. In the research report on which the revalidation of waivers was based, the waiver group's data was from the period July 1992 to February 1994 and the GES data was from calendar year 1992.[21] It is unlikely the two sets of data were comparable, because estimates of total truck accidents vary significantly from year to year in the NHTSA's National Accident Sampling System (from which the GES is derived). Blower, et al., *supra* note 19 at 307.

One of the strongest challenges to the reliability of the data is that the study relied on self-reports of visually

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[19] Among the factors related to crash risk are: age and annual mileage (Decina, et al., *supra* note 12 at 11), type of road, tractor configuration, the time of day driving occurs, and geographic location of road (rural or urban) (Daniel Blower, et al., *Accident Rates for Heavy Truck-Tractors in Michigan*, 25 Accid. Anal. & Prev. No. 3 at 307 (1993)).

[20] Data for the national group was taken from the General Estimates System ("GES") (National Highway Traffic Safety Administration, *Traffic Safety Facts 1992* at 17, 26). The researchers looked at total crash rates, and the severity and initial point of impact of crashes. Crash rates were calculated as number of accidents divided by million vehicle miles traveled ("VMT").

[21] Sheridan et al., *supra* note 18, *The Third Interim Monitoring Report On The Drivers Of Commercial Motor Vehicles Who Receive Vision Waivers* at 1-2 (June 27, 1994).

impaired drivers for data on crashes and mileage driven. The researchers themselves noted that self-reports are problematic because of willful non-reporting by drivers and admitted that, in spite of an elaborate system of reminders and warnings, many drivers were not particularly reliable about their reporting obligations. Sheridan et al., *supra* note 18 at 70.

Although it was part of the original research design, the first attempt to monitor state motor vehicle records to check the accuracy of self-reports did not begin until July 1993, and states which had not responded by November 1993 were not sent follow-up requests for records until March 1994. Sheridan et al., *supra* note 18 at 61-62. The effect of non-reporting on reported results is demonstrated by the fact that the waiver group's accident rate was originally reported as 1.775 per million VMT as of August 1993 (compared to 2.531 for the national group),[22] but was later revised to 2.12 as of June 1993 (the rate for the national group was reduced to 2.13).[23] The changes are even more striking when one considers that the latter report apparently excluded data, including accident involvement, for 381 drivers whose waivers had been revoked. Data is only presented for drivers still active in the waiver program at the time a report is prepared; when an individual's waiver is revoked for program noncompliance, vision degradation, self-termination or death, any accidents he or she was involved in are removed from the analysis. *Id.* at 2, 4.

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[22] Sheridan et al., *supra* note 18, *Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers (Revised)* at 2 (March 22, 1994).

[23] Sheridan et al., *supra* note 18, *An Assessment of the Risk Associated With the Disposition of Vision and Diabetes Waiver Programs* at Table 2 (October 12. 1995).

III. Albertsons Had No Obligation to Accommodate Kirkingburg

Kirkingburg asserts "[t]he ADA imposes an affirmative obligation on the employer to reasonably accommodate individuals with disabilities. . . ." (Resp. Br., 45) (citing to 42 U.S.C. § 12112(b)(5)(A)). Kirkingburg leaves out a key term from the statute -- the individual must be "otherwise qualified" -- for the obligation of reasonable accommodation to apply. Kirkingburg is not "otherwise qualified," and the Company had no obligation to offer him a reasonable accommodation. Albertsons relies on its discussion of this issue in its Brief on the Merits (Pet. Br., 42-44).

A. Albertsons did not need to offer Kirkingburg a futile reasonable accommodation.

Kirkingburg asserts that the Company failed to reasonably accommodate him by refusing to provide him with a leave of absence in order to obtain a vision waiver, or "other form of job restructuring" (Resp. Br., 47). The goal of reasonable accommodation is to remove work place barriers and enable otherwise qualified individuals to enjoy equal employment opportunities as those who are not disabled. 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance).

An employer has no obligation to provide an employee with leave when it is impossible for the employee to "become qualified" during the period of leave.[24]

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[24] H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 64-65 (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303.

Regardless how much time the Company might have given Kirkingburg to obtain a waiver, having the waiver would essentially have no effect because Kirkingburg would still not be qualified for the position of truck driver at Albertsons.

Albertsons also had no obligation to restructure Kirkingburg's job as a truck driver. The Regulations unambiguously state that an employer has no obligation to waive essential functions of a position in providing an accommodation or to create a new position. 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance). In the EEOC's view, the underlying goal of accommodation is to enable an otherwise qualified individual to perform the essential functions of his or her job. EEOC Technical Assistance Manual § 3.2, page III-2.

In this case, in order for Kirkingburg to be qualified for the position of truck driver, his job would have to be restructured so he would not be required to drive in interstate commerce. That is an essential function of his job as a truck driver. Albertsons has no obligation to eliminate or restructure that essential function as a reasonable accommodation.

B. Albertsons was not required to reassign or temporarily transfer Kirkingburg to the Yard Hostler position.

Kirkingburg suggests that Albertsons should have temporarily transferred him to the Yard Hostler position in November 1992 rather than terminating his employment (Resp. Br., 46).[25] There are two problems with the

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[25] Albertsons does not concede that it had a legal duty to reassign Kirkingburg (Pet. Br., 46-48). Despite the mandatory language in the recent EEOC Enforcement Guidance (at page 19), Albertsons continues to believe this exceeds the intent of the statute, which is permissive. 42 U.S.C. § 12111(a)(B).

contention. First, the Yard Hostler position required the same DOT certificate for visual acuity as any other driving position with the Company (J.A. 396). Second, even if this Court found that Albertsons' qualification standard for vision should not apply to the position of Yard Hostler, Kirkingburg failed to establish that the position was vacant in November 1992 (J.A. 128).

The most recent EEOC Policy Guidance, issued March 1, 1999, specifically addressed reasonable accommodation under the ADA. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (www.eeoc.gov/docs/accommodation.html). Assuming, *arguendo*, that the Court finds Albertson had an affirmative duty to offer Kirkingburg a vacant position, Kirkingburg must have been qualified for that position and the position must be vacant (Id. at 19). "Vacant" means that ". . . the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time." Id. at 20.[26]

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[26] Two examples provided in the EEOC's Guidance are instructive:

> Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

On Kirkingburg's Motion for Reconsideration of Summary Judgment on this exact issue, the trial judge denied the Motion because Kirkingburg failed to show that the yard hostler job was vacant when he was terminated (J.A. 128). Consequently, this issue should not be remanded, as Kirkingburg suggests, because it was previously decided by the trial court.

Respectfully Submitted,

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Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent positions plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

Id. at 20.